

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 MUR 6579)

6)
7 ABC News, Inc.)

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM (Media Case)

8
9
10 **GENERAL COUNSEL'S REPORT**

11
12 Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring
13 criteria as a basis to allocate its resources and decide which matters to pursue. These criteria
14 include without limitation an assessment of the following factors: (1) the gravity of the alleged
15 violation, taking into account both the type of activity and the amount in violation; (2) the apparent
16 impact the alleged violation may have had on the electoral process; (3) the complexity of the legal
17 issues raised in the matter; and (4) recent trends in potential violations of the Federal Election
18 Campaign Act of 1971, as amended ("the Act"), and developments of the law. It is the
19 Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants
20 the exercise of its prosecutorial discretion to dismiss cases under certain circumstances. Moreover,
21 in cases where the allegations contained in the complaint fall squarely within the media exemption,
22 the Office of General Counsel will recommend such matters be dismissed, notwithstanding the
23 receipt of a response from any potential respondents, within the 15 day period allotted for a
24 response under 2 U.S.C. § 437g(a)(1).¹ The Office of General Counsel has determined that MUR
25 6579 is a matter falling squarely within the media exemption and, therefore, recommends that the
26 Commission dismiss this matter prior to receiving a response to the complaint.²

¹ Under 2 U.S.C. § 437g(a)(1), the Commission may dismiss a matter within 15 days from the notification to any potential respondents regardless as to whether a response has been received.

² The EPS rating information is as follows:
May 29, 2012.

Complaint Filed: May 21, 2012. Notification Sent:

1 In MUR 6579, complainant Matt Nelson asserts that ABC News, Inc., a division of the
2 American Broadcasting Companies, Inc., ran what he describes as a “‘news’ segment about
3 [actress] Betty White endorsing” President Obama for re-election on ABC’s “national news on
4 Saturday, May 12, 2012.” Complaint at 1. According to Mr. Nelson, the piece was a “60 second
5 commercial,” as it lacked “news content.” *Id.* Therefore, Mr. Nelson alleges that ABC News made
6 an illegal in-kind contribution to the President’s re-election campaign in violation of 2 U.S.C.
7 § 441b(a), (b)(2), which prohibits contributions by corporations, including in-kind contributions.
8 *Id.*³

9 The Act prohibits corporations from making contributions, including in-kind contributions,
10 to candidates and their authorized committees, *see* 2 U.S.C. § 441b(a). The Act and Commission
11 regulations exclude from the definitions of contributions and expenditures “any cost incurred in
12 covering or carrying a news story, commentary, or editorial” by news outlets, including
13 broadcasting stations, newspapers, magazines, Internet websites and other electronic publications,
14 unless such facilities are “owned or controlled by any political party, political committee, or
15 candidate . . .”. 11 C.F.R. §§ 100.73 and 100.132; *see also* 2 U.S.C. § 431(9)(B)(i).

16 The Commission conducts a two-step analysis to determine whether the media exemption
17 applies. First, the Commission asks whether the entity engaging in the activity is a media entity.
18 *See* Advisory Opinions 2010-8 (Citizens United); 2005-16 (Fired Up!); and 1996-16 (Bloomberg).

³ Although Mr. Nelson does not provide additional information about the news story central to his complaint, he does provide a link to “a story on this” on ABC’s website. *See* <http://a.abcnews.go.com/Entertainment/betty-white-reveals-presidential-preference/comments?type=story&id=16333704>. Additionally, there is an AP account reporting on Ms. White’s endorsement, available at <http://news.yahoo.com/betty-white-reveals-her-presidential-preference-071449210.html>. Based on the analysis presented below, all of these accounts, along with the ABC News broadcast at issue, would fall under the Commission’s media exemption.

1 Second, in determining the scope of the exemption, the Commission considers two factors:
2 (1) whether the press entity is owned or controlled by a political party, political committee, or
3 candidate; and, (2) whether the media entity is acting as a media entity in conducting the activity at
4 issue (i.e., whether the entity is acting in its "legitimate press function"). *See Reader's Digest*
5 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). With respect to the second factor,
6 to determine whether an entity was engaged in a legitimate media function, the Commission
7 examines: (1) whether the entity's materials are available to the general public; and (2) whether the
8 materials are comparable in form to those ordinarily issued by the entity. *See, e.g., Advisory*
9 *Opinion 2010-8 (Citizens United) (citing FEC v. Massachusetts Citizens for Life, 479 U.S. 238,*
10 *250-251 (1986)); Advisory Opinion 2005-16 (Fired Up!).*

11 The Commission has recognized that an entity otherwise eligible for the media exemption
12 "would not lose its eligibility merely because of a lack of objectivity in a news story, commentary,
13 or editorial, even if the news story, commentary, or editorial expressly advocates the election or
14 defeat of a clearly identified candidate for Federal office." *Advisory Opinion 2005-16 (Fired Up!);*
15 *see also MUR 5928 (Kos Media, LLC).*

16 Here, ABC News fits squarely within the media exemption. First, ABC News is a media
17 entity that regularly provides news and commentary on its television broadcasts, as well as on its
18 Internet website. Second, in determining the scope of the exemption, the complaint does not allege,
19 nor have we discovered, any publicly available information indicating that ABC News is owned by
20 a political candidate, committee or party. Furthermore, ABC News, is widely made available to and
21 viewed by the public, and the Complaint fails to allege any facts, nor are we aware of any,
22 suggesting that the news segment featuring Betty White's endorsement of President Obama is
23 somehow out of the ordinary from the type of news that ABC News typically covers. Finally, the

12044314371

fact that the news piece cited by the complainant promotes President Obama's candidacy does not remove it from the scope of the media exemption. *See* Advisory Opinion 2005-16 (Fired Up!); *see also* MUR 5928 (Kos Media, LLC).

Accordingly, since the conduct at issue in the Complaint is covered by the media exemption, the Office of General Counsel recommends that the Commission dismiss this matter.

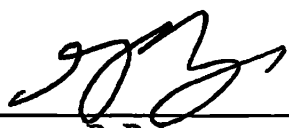
RECOMMENDATIONS

The Office of General Counsel recommends that the Commission exercise its prosecutorial discretion and dismiss this matter, *see Heckler v. Chaney*, 470 U.S. 821 (1985), close the file, and send the appropriate letters.

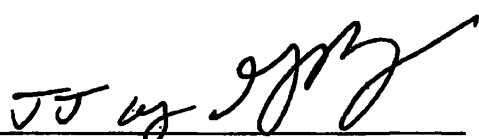
Anthony Herman
General Counsel

6/5/12
Date

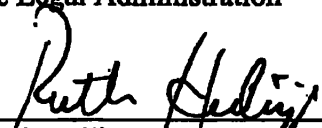
BY:



Gregory R. Baker
Special Counsel
Complaints Examination
& Legal Administration



Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration



Ruth Heilizer, Attorney
Complaints Examination
& Legal Administration